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No. 88-1243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN RE GRAND JURY PROCEEDINGS, COMPANY X,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY MEMORANDUM OF COMPANY X IN SUPPORT OF PETITION

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Washington, D.C.

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MISCELLANEOUS:

Petition of the United States for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, *United States v. Zolin*, No. 88-40 (filed July 7, 1988) 3

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1. The government is wrong in arguing that this case is distinguishable from *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 701 (1988), which holds that where the crime-fraud exception is applied to litigation documents:

> The focus must be narrowed to the specific purpose of the particular communication or document. To the extent the document deals with a protected activity, it is immune from discovery.

Id. at 525.

The government contends that, unlike *Burlington Northern*, "this was not a case in which Law Firm Y

represented petitioner in some matters that were not infected by petitioner's fraudulent intent. . . ." Opp. at 8.[1] No such finding was made by the courts below. It is undisputed that Company X's attorneys were engaged in a protected activity, the defense of product liability claims.

The district court merely found that it was during *that* legitimate representation that Company X "used" its attorneys to perpetuate a crime or fraud. The district court did not, as the government states, also find that "the subpoenaed communications and documents [were] generated as a direct consequence" of the alleged crime or fraud involving the use of its attorneys. Opp. at 8-9. Indeed, the district court could not have made such a finding given the critical fact that the subpoenas call for documents created during the litigation for the purpose of defending against claims alleging injury from past acts.

Because the defense of past acts in litigation is a protected activity, the crime-fraud exception cannot be applied in a wholesale fashion to litigation files. Rather, as *Burlington Northern* holds, there must be a determination that the particular privileged documents sought from those files were created for the purpose of furthering a crime or fraud rather than for the purpose of defending the litigation. The lower courts' failure to consider the purpose of the litigation documents subject to

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[1] The government's attempts to distinguish the other cases cited by petitioner, *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986); *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986); *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 281 (8th Cir. 1984), *cert. dismissed*, 472 U.S. 1022 (1985), are based on the same false premise. The courts below did not find that the entire defense of the products liability litigation was itself illegitimate. Therefore, as in the cases cited by petitioner, there should have been an examination of the documents to determine whether their purpose was to further a crime or fraud or to defend litigation.

the subpoena demands resulted in an overbroad order compelling the wholesale production of protected communications and documents. *See* Pet. at 2 and 8. That order is inconsistent with the legal standard applied in *Burlington Northern*, and by three other courts of appeal (*see supra* note 1), a standard that the government agrees should apply.

2. The government concedes that many courts of appeal have "endorsed" *in camera* review to ensure that privileged documents are not improperly disclosed.[2] It argues, however, that no case cited by petitioner holds that there must be *in camera* inspection "under all circumstances." Opp. at 10. That is a meaningless qualification. In circumstances that are indistinguishable from the instant case, the Sixth Circuit reversed a district court order, explaining:

> The district court found that since the government had established a *prima facie* case . . . all the documents . . . were communicated or done in furtherance of that violation. It made this determination without reviewing the documents *in camera*. We find this to be plain error. Every circuit that has considered the crime-fraud exception to a claim of privilege has reviewed the documents *in camera* before deciding whether they should be produced.

In Re Antitrust Grand Jury, 805 F.2d at 168 (citations omitted). Similary, in *In re Sealed Case*, 754 F.2d 395,

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[2] The government fails to mention its own endorsement of *in camera* review as "often the *most reliable* way of determining" whether a communication should be subject to the crime-fraud exception. Petition of the United States for Writ of Certiorari, *United States v. Zolin*, No. 88-40 (filed July 7, 1988). In this case, where the subpoenas were open-ended demands for all documents "by, from and to" attorneys, *in carea* review is the *only* way of determining whether individual documents or categories of documents reflect communications whose purpose was to further a crime or fraud. *See In re Antitrust Grand Jury*, 805 F.2d at 168.

403 (D.C. Cir. 1985), the court squarely held that a question-by-question review was required before privileged communications could be compelled under a "cover-up" theory such as that postulated in the instant case.

The government also argues that the district court, by reviewing the subpoenas, conducted the "functional equivalent" of an *in camera* review of the subpoenaed documents. It defies reason and common sense to equate a review of subpoena paragraphs (particularly open-ended demands for all documents "by, from and to" attorneys relating to past events) with a review of the documents to determine if they were created for the purpose of perpetuating a crime or fraud. *In camera* review is either necessary to safeguard the attorney-client privilege and work product doctrine, as six courts of appeal have held (*see* Pet. at 10), or it is not, as the court below has now ruled.[3]

Finally, the government claims that *United States v. Zolin*, 842 F.2d 1135 (9th Cir.), *cert. granted*, 109 S. Ct. 257 (1988), is inapposite, undoubtedly preferring this Court to rule in *Zolin* that *in camera* review can be used to establish the crime-fraud exception while allowing the decision below to stand as precedent for denying its use as a safeguard against an overbroad invasion of the attorney-client and work-product privileges. However, these two cases are very much related.[4] *In camera* review should

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[3] The government mischaracterizes one phrase from Company X's district court brief and argues that the *in camera* review issue was not raised in the district court. That argument was advanced unsuccessfully below, where the court of appeals addressed the issue (as had the district court) and held that *in camera* review was not necessary.

[4] Indeed, the dissenting judges in *Zolin*, like petitioner, advocate the use of *in camera* review as a safeguard against orders compelling the *en masse* production of privileged documents. *United States v. Zolin*, 842 F.2d at 1138 (dissent).

not be a one-way proposition—an offensive weapon solely for the prosecutor's benefit. The interests of the public are broader than that and will be served best if this Court were to use both cases to provide guidance concerning the appropriate role for *in camera* review in determining the parameters of the crime-fraud exception.

For the above reasons, petitioner respectfully submits that its Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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